Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

78-1159

CHARLES G. HANNER,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

STATE'S REPLY TO PETITION FOR WRIT OF CERTIORARI

By and Through: THE STATE OF TEXAS
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STATE'S REPLY TO PETITIONER'S WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Respondent prays that a writ of certiorari be denied, to review the judgment of the Texas Court of Criminal Appeals entered in the above entitled case on November 1, 1978.

OPINIONS BELOW

Are as stated in Petitioner's brief.

JURISDICTION

Is as stated in Petitioner's brief.

QUESTION PRESENTED

Did the jury's general verdict include by implication or otherwise a finding that the Petitioner personally en-

gaged in sexual intercourse with the Prosecutrix. The federal question presented is whether or not the absence of a specific finding thereon is a violation of the Fourteenth Amendment due process rights.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment rights of "due process".

STATEMENT

The Petitioner has correctly stated the facts and results of the case.

The trial judge defined "sexual intercourse" to mean "any penetration of the female sex organ by the male sex organ". The trial judge thereafter instructed the jury that they must find beyond a reasonable doubt that sexual intercourse occurred. The trial court further charged the jury,

> "if you believe from the evidence beyond a reasonable doubt that the Defendant, Charles G. Hanner, on or about the 20th day of May, 1975, in the County of Brazoria and State of Texas . . . did then and there intentionally or knowingly by force, that overcame such earnest resistance as might reasonably have been expected under the circumstances, compel Glenda R. Sanders, a female not his wife, to submit to sexual intercourse without her consent, you will find the Defendant guilty of the offense of Rape by Force as charged in the first count of the indictment and so say by your verdict . . . (R. 670).

The prosecutrix testified that Petitioner could not achieve an "erection" and that despite his efforts his penis only partially penetrated her vagina. Petitioner first

raped prosecutrix on the front seat of the car, and subsequently forced prosecutrix into the back portion or hatchback area of the car, where he then continued to rape her for approximately ten to fifteen minutes.

ARGUMENT AND AUTHORITIES FOR NOT GRANTING THE WRIT

The State submits that the above summary of the trial court's charge and of the evidence clearly includes a finding (by implication, if necessary) that the Petitioner *did in fact* have sexual intercourse with the Prosecutrix, and under the law and facts of this case, there can be no finding by the Supreme Court of the United States that Petitioner was denied his Fourteenth Amendment "due process" rights. *Hanner v. State,* 572 S.W.2d 702 (Tex. Crim. App. 1978); Sec. 21.01(3), Texas Penal Code; Sec. 21.02, Texas Penal Code. The case of *Posey v. State,* 38 So. 1019, 143 Ala. 54, held that where the court charges that actual penetration is sufficient, it is proper to refuse to charge that the accused must have had sexual intercourse.

Other Texas Court of Criminal Appeals cases upholding this type of action by a trial court are: *Jones v. State,* 119 Cr. R. 525, 46 S.W.2d 308 (1932), holding that in a prosecution for rape by force, the trial court's definition of "force" was sufficiently explicit where the only issue was as to whether there was sexual intercourse; *Hall v. State,* 141 Cr. R. 607, 150 S.W.2d 404 (1941), holding that in a trial for rape, the court's charge, sufficiently defining rape, force and threats, was not erroneous because of failure to define carnal knowledge, ravished, consent, resistance and penetration.

Some pertinent Federal cases concerned with the sufficiency of the trial court's instructions are as follows: *U. S. v. Marshall,* 266 F.2d 92 (7th Cir. 1959), holding that in a rape prosecution, the instructions as a whole, which clearly defined the elements of the offenses involved, fairly charged the jury as to the applicable law; and other cases under Section 822(6), "Criminal Law", West's Modern Federal Practice Digest, upholding the principle of law that a court's charge which clearly defines the elements of the offense, when considered as a whole and viewed in its entirety, and in the light of the evidence in the case, is sufficient to comply with the requirements of the law.

Further, the Petitioner failed to request an instruction requiring a finding that the Defendant personally had sexual intercourse with the prosecutrix, and his failure to do so, under Texas law, constitutes a waiver of the right to complain thereof (unless such a failure is fundamental error). See Texas Code of Criminal Procedure Articles 36.14, 36.15, 36.16, 36.17, 36.18 and 36.19. In accord, *Johnson v. State,* 449 S.W.2d 65 (Tex. Crim. App. 1969), holding that Defendant's contention that impotency rendered the accused incapable of committing the act of rape would not be determined where he did not present a requested charge on impotency nor object to the court's failure to charge thereon. In accord, *Grandham v. State,* 528 S.W.2d 220 (Tex. Crim. App. 1975), cert. den. 96 S.Ct. 1434, 424 U.S. 957, 47 L.Ed.2d 363, holding that the Defendant failed to preserve for review issue of alleged insufficiency of trial court's definition of aggravated rape, where this objection was not included in Defendant's objections to the court's charge on punishment.

The United States Supreme Court case of *Screws v. U. S.,* 325 U.S. 91, 65 S.Ct. 1031 (1945), cited by the Petitioner herein, (at page 107) held that in the case where no exception was taken to the trial court's charge, the Supreme Court would not normally take note of the error, citing *Johnson v. U. S.,* 318 U.S. 189, 200, 63 S.Ct. 549, 555, 87 L.Ed. 704.

In accord, see cases on "Effect of Failure To Object or Except", Section 847, "Criminal Law", West's Modern Federal Practice Digest.

CONCLUSION

For the above reasons of fact and law, the State respectfully submits the Writ of Certiorari should be denied.

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